Jamaludin bin Md Kassim v Public Prosecutor

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05–141–2009(J)
ARIFIN ZAKARIA CJ (MALAYA), RAUS SHARIF AND HELILIAH FCJJ
18 OCTOBER 2010

Criminal Law — Dangerous drugs — Trafficking — Appeal against conviction — Whether there were serious errors committed in findings of fact by trial judge and Court of Appeal — Whether failure by prosecution to call material witness resulted in serious gap in prosecution's case — Whether decision of Federal Court in Ti Chuee Hiang v Public Prosecutor applicable to facts of present case — Whether prosecution's failure to make witness available for cross-examination by defence before close of prosecution's case entitled appellant to acquittal — Dangerous Drugs Act 1952 ss 39B(2), 12(2), 6 & 37(da)

Acting on information received, Chief Inspector Arman bin Ibrahim ('the Chief Inspector') and a police party conducted a raid on a house in Johor Bahru ('the premises'). While conducting the raid the Chief Inspector heard sounds from a window in one of the rooms in the premises, which led him to open the window. The window led to a dark alley and when the Chief Inspector shone a torch into the dark alley he allegedly saw the appellant shivering and squatting on the floor holding a sling bag in his left hand and a plastic bag in his right hand. The Chief Inspector then directed police officers Jasmani bin Othman ('SP6') and another, who were both members of the police party, to bring the appellant into the second room of the premises through the window. When the two bags that the appellant was carrying were searched they were found to contain, what was later confirmed by the chemist to be, 32.6g of monoacetylmorphine, 3.99g of methamphetamine and 2.02g of cannabis, all dangerous drugs under the Dangerous Drugs Act 1952 ('the Act'). The appellant was then charged with trafficking in 32.6g of monoacetylmorphine, an offence punishable under s 39B(2) of the Act and two charges of possession of the two other dangerous drugs that he was arrested carrying. In his defence, the appellant, who elected to give evidence on oath, testified that he had hidden himself in the alley because he had not complied with an order made against him under the Emergency (Public Order and Prevention of Crime) Ordinance 5, 1969 ('the PCO order') made against him. He also said that he was hiding in the alley until an Indian policeman, one D/Kpl Ravidas ('Ravidass'), spotted him and asked him to come out and that at that time he was not carrying any bags. It was the appellant's version that he had never seen the two bags found to contain the drugs which were the subject matter of the three charges and he denied that the bags belonged to him. He further alleged that he was beaten by

the police with two canes while he was in the room and that his wife had witnessed the beatings. Based on the evidence of the Chief Inspector and SP6, the trial judge made an affirmative finding of the proscribed drugs by the appellant and then invoked the presumption of trafficking under s 37(da) of the Act. The appellant was found guilty of all three charges and convicted and sentenced. The appellant's appeal to the Court of Appeal challenging the evidence of the Chief Inspector and the narrative of the case for the prosecution was dismissed. The Court of Appeal could not find any fault with the findings and reasoning of the trial judge. This was the appellant's appeal against that decision. The appellant, in reliance on the decision of the Federal Court in *Ti Chuee Hiang v PP* [1995] 2 MLJ 433 ('*Ti Chuee Hiang*'s case'), submitted that Ravidass was a material witness and the failure by the prosecution to call him as a witness had resulted in a serious gap in the prosecution's case. He further submitted that the prosecution's failure to make Ravidass available for cross-examination by the defence before the close of the prosecution's case entitled him to an acquittal. In response the prosecution submitted that Ravidass was not a material witness who had to be offered to the defence to be cross-examined before the close of the prosecution's case.

Held, dismissing the appeal:

(1) Both the High Court and the Court of Appeal made the concurrent finding of fact that the appellant was in physical possession and mens rea possession of the dangerous drugs and that the appellant's defence had failed on the balance of probabilities to rebut the presumption of trafficking under s 37(da) of the Dangerous Drugs Act. Being concurrent findings of fact at both levels, this court would be slow in interfering unless there were serious errors committed in coming to such findings (see para 13).

(2) The principle of law established in *Ti Chuee Hiang*'s case could not be of general application as suggested by the appellant, as the case was a decision peculiar to its own facts. It was on the facts and circumstances of that case that the Federal Court had ruled it was the obligation of the prosecution to call and examine the witness as he came within that category of witnesses who were essential to the unfolding of the prosecution case. Although this court had no hesitation in accepting the principle in *Ti Chuee Hiang*'s case, it was of the view that the principle in that case was not applicable to the facts of the present case. Ravidass was not a material witness in regard to the arrest of the appellant and the recovery of the drugs and the absence of his testimony did not create a serious gap in the prosecution's case. As such, the failure of the prosecution to offer Ravidass to be cross-examined before the close of the prosecution's case was not fatal to the prosecution's case, so as to result in the acquittal of the appellant (see paras 19–21 & 23).

(3) Further, unlike *Ti Chuee Hiang*'s case both the trial judge and the Court of Appeal had ruled that the failure to call Ravidass as a prosecution witness was not fatal to the prosecution's case. Thus, the issue of misdirection by way of non-direction which can occasion a miscarriage of justice did not arise in this case (see para 24 & 25).

[Bahasa Malaysia summary

Bertindak atas informasi yang diterima, Ketua Inspektor Arman bin Ibrahim ('Ketua Inspektor') dan pasukan polis menjalankan satu serbuan ke atas sebuah rumah di Johor Bahru ('premis tersebut'). Semasa menjalankan serbuan tersebut, Ketua Inspektor mendengar bunyi daripada tingkap salah sebuah bilik di premis tersebut, yang membawanya untuk membuka tingkap tersebut. Tingkap tersebut mengarah ke sebuah lorong yang gelap dan apabila Ketua Inspektor menyuluh lampu suluh ke dalam lorong gelap tersebut, dia melihat perayu menggigil dan mencangkung di atas lantai memegang sebuah beg galas di tangan kirinya dan sebuah beg plastik di tangan kanannya. Ketua Inspektor kemudian mengarahkan pegawai-pegawai polis Jasmani bin Othman (SP6) dan seorang lagi yang kedua-duanya adalah pasukan polis tersebut untuk membawa perayu ke bilik kedua premis tersebut melalui tingkat. Apabila kedua-dua beg yang dibawa oleh perayu dicari, ia didapati mengandungi, apa yang kemudiannya disahkan oleh ahli kimia sebagai, 32.6g monoacetylmorphine, 3.99g methamphetamine dan 2.02g kanabis, yang kesemuanya adalah dadah berbahaya di bawah Akta Dadah Berbahaya 1952 ('Akta'). Perayu kemudiannya dituduh dengan pengedaran 32.6g monoacetylmorphine, suatu kesalahan yang boleh dihukum di bawah s 39B Akta tersebut dan dua pertuduhan bagi milikan dua lagi dadah berbahaya yang dia bawa semasa ditangkap. Di dalam pembelaannya, perayu yang memilih untuk memberikan keterangan bersumpah, menyatakan bahawa dia menyorok diri di lorong tersebut kerana dia tidak mematuhi perintah yang diberikan terhadapnya di bawah Ordinan Darurat 5 (ketenteraman Awam dan Mencegah Jenayah) 1969 ('Ordinan tersebut'). Dia juga menyatakan bahawa dia menyorok di dalam lorong tersebut sehingga seorang polis berbangsa India, D/Kpl Ravidass ('Ravidass'), nampak dia dan menyuruhnya keluar dan pada ketika itu dia tidak membawa apa-apa beg. Ia adalah versi perayu bahawa dia tidak pernah melihat kedua-dua beg yang ditemui mengandungi dadah-dadah tersebut yang merupakan subjek perkara ketiga-tiga pertuduhan dan dia menafikan bahawa beg-beg tersebut adalah kepunyaannya. Dia selanjutnya menyatakan bahawa dia telah dipukul oleh pihak polis dengan dua rotan semasa dia di dalam bilik dan bahawa isterinya telah menyaksikan pukulan-pukulan tersebut. Berdasarkan keterangan Ketua Inspektor dan SP6, hakim bicara membuat penemuan yang sah terhadap dadah yang diharamkan oleh perayu dan kemudian membangkitkan anggapan pengedaran di bawah s 37(da) Akta tersebut. Perayu didapati bersalah atas ketiga-tiga pertuduhan dan disabitkan dan dihukum. Perayu merayu ke Mahkamah Rayuan mencabar keterangan Ketua Inspektor dan naratif kes untuk pihak pendakwaan telah

ditolak. Mahkamah Rayuan tidak boleh menemui apa-apa kesalahan dengan penemuan dan alasan oleh hakim perbicaraan. Ini adalah rayuan perayu terhadap keputusan tersebut. Perayu, dalam bergantung kepada keputusan Mahkamah Persekutuan di dalam kes *Ti Chuee Hiang v Public Prosecutor* [1995] 2 MLJ 433 ('kes *Ti Chuee Hiang*') menghujah bahawa Ravidass adalah saksi yang material dan kegagalan pihak pendakwaan memanggilnya sebagai saksi menyebabkan jurang yang serius di dalam kes pihak pendakwaan. Dia selanjutnya menghujah bahawa kegagalan pihak pendakwaan mengemukakan Ravidass untuk pemeriksaan balas oleh pihak pembelaan sebelum penutupan kes pendakwaan memberikannya hak untuk dilepaskan. Di dalam jawapannya pihak pendakwaan menghujah bahawa Ravidass bukanlah saksi material yang perlu ditawarkan kepada pihak pembelaan untuk diperiksa balas sebelum penutupan kes pihak pendakwaan.

Diputuskan, menolak rayuan:

(1) Kedua-dua Mahkamah Tinggi dan Mahkamah Rayuan membuat penemuan fakta yang serupa bahawa perayu mempunyai milikan fizikal dan mens rea milikan dadah berbahaya tersebut dan pembelaan perayu telah gagal atas imbangan kebarangkalian untuk mematahkan anggapan pengedaran di bawah s 37(da) Akta tersebut. Sebagai penemuan fakta yang serentak di kedua-dua peringkat, mahkamah ini akan perlahan dalam campur tangan kecuali terdapat kesilapan serius dilakukan dalam membuat penemuan sedemikian (lihat perenggan 13).

(2) Prinsip undang-undang yang dibuktikan di dalam kes *Ti Chuee Hiang* tidak boleh diaplikasikan secara umum seperti yang dicadangkan oleh perayu, kerana kes tersebut adalah kes khusus kepada faktanya sendiri. Ia adalah di atas fakta dan hal keadaan kes tersebut yang Mahkamah Persekutuan telah memutuskan ia adalah kewajipan pihak pendakwaan untuk memanggil dan memeriksa saksi kerana dia terangkum dalam kategori saksi yang penting kepada pembentangan kes pihak pendakwaan. Walaupun mahkamah ini tidak teragak-agak dalam menerima prinsip kes *Ti Chuee Hiang*, ia berpendapat bahawa prinsip di dalam kes tersebut tidak beraplikasi di dalam fakta kes ini. Ravidass bukan seorang saksi material berkaitan dengan tangkapan perayu dan penemuan dadah dan ketiadaan keterangannya tidak membentuk jurang yang besar di dalam kes pihak pendakwaan. Oleh demikian, kegagalan pihak pendakwaan menawarkan Ravidass untuk diperiksa balas sebelum penutupan kes pihak pendakwaan tidak menjejaskan kes pihak pendakwaan, untuk membawa kepada pelepasan perayu (lihat perenggan 19–21 & 23).

(3) Selanjutnya, tidak seperti kes *Ti Chuee Hiang* kedua-dua hakim bicara dan Mahkamah Rayuan telah memutuskan bahawa kegagalan memanggil Ravidass sebagai saksi pihak pendakwaan tidak menjejaskan

kes pihak pendakwaan. Oleh itu, isu salah arah melalui tiada arahan yang boleh membawa kepada ketidakadilan tidak timbul di dalam kes ini (lihat perenggan 24 & 25).]

Notes

For cases on trafficking, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 126–137.

Cases referred to

Jamaluddin bin Md Kasim v PP [2010] 3 MLJ 221; [2010] 5 CLJ 928, CA (refd)

Krishna Rao a/l Gurumurthi v PP and another appeal [2009] 3 MLJ 643; [2009] 2 CLJ 603, FC (refd)

Lee Ah Seng & Anor v PP [2007] 6 MLJ 1; [2007] 5 CLJ 1, FC (refd)

Seneviratne v R [1936] 3 All ER 36, PC (not folld)

Ti Chuee Hiang v PP [1995] 2 MLJ 433, SC (distd)

Legislation referred to

Dangerous Drugs Act 1952 ss 6, 12(2), 37(da), 39B(1)(a), (2), 40

Emergency (Public Order and Prevention of Crime) Ordinance 5, 1969

Appeal from: Criminal Appeal No J–05–98 of 2007 (Court of Appeal, Putrajaya)

Gobind Singh Deo (S Prakash with him) (Gobind Singh Deo & Co) for the appellant.

Fatnin Yusof (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Raus Sharif FCJ (delivering judgment of the court):

[1] The appellant was charged before the High Court at Johor Bahru with three charges: first, under s 39B(2) of the Dangerous Drugs Act 1952 ('DDA') with trafficking in 32.6g of monoacetylmorphine; second, under s 12(2) of the DDA read with s 39A of the same Act for possession of 3.99g of methamphetamine; and third, under s 6 of the DDA for possession of 2.02g of cannabis. The appellant was convicted of all these charges. He was sentenced to death on the first charge, five years imprisonment and ten strokes of the rotan on the second charge and four years imprisonment on the third charge. The imprisonment terms on the second and the third charge were ordered to run concurrently.

[2] Aggrieved, the appellant appealed to the Court of Appeal. On 20 August 2009, the appellant's appeal was dismissed. The Court of Appeal upheld the

conviction and sentence imposed on the appellant. The appellant now appeals to this court against the conviction and sentence.

[3] After hearing the parties, we adjourned the matter for our consideration and decision. We now give our decision and the reasons for the same. We first start with the facts.

[4] On 23 July 2003 at about 6am, acting on information received, Chief Inspector Arman bin Ibrahim ('SP5') and a police party consisting of D/Kpl Jasmani bin AN Othman ('SP6') and several other police personnel conducted a narcotics raid on a house at No 50C, Kg Hajjah Fatimah, Batu 3 1/S Jalan Tampoi Majidee, Johor Bahru ('the premise'). While conducting a search on the premise, SP5 heard human movements behind the wooden wall of a room. Upon examination, he found a sliding panel on the wooden wall covering a window. He pushed apart the panel and opened the window which led to a dark alley. He shone a torch into the alley and saw the appellant squatting on the floor holding a blue sling bag ('P13') in his left hand and a white plastic bag ('P20') on his right hand. The appellant was shivering. SP5 then directed SP6 and another policeman to enter the dark alley and bring the appellant out. PW5 found P13 and P20 to contain the incriminating drugs which form the subject matter of the three charges.

[5] SP5 later handed the drugs to Inspector Muhamad Johar bin Yusof ('SP7') who thereafter sent them to the chemist, Abdullah bin Mohd Yusof ('SP3') for analysis. Upon analysis, SP3 confirmed the identity and quantity of the drugs to be 32.6g of monoacetylmorphine; 3.99g of methamphetamine; and 2.02g of cannabis, which are dangerous drugs under the DDA.

[6] The appellant, in his defence, claimed that he hid himself in the alley when he detected the presence of the police because he was in breach of an order under the Emergency (Public Order and Prevention of Crime) Ordinance 5, 1969 ('PCO order') made against him. Under the PCO order he was supposed to report himself in Kelantan and he had not complied with the order since December 2002. The appellant denied of having physical possession of P13 and P20 or knew the contents thereof. The appellant further claimed that he was spotted and asked to come out of the alley by an Indian policeman, D/Kpl Ravidass and not by SP5 and SP6. He also alleged that he was beaten by the police with two canes, while he was in the room and this was seen by the wife.

FINDINGS OF THE HIGH COURT

[7] At the close of the prosecution's case, the trial judge found the prosecution has proved a prima facie case against the appellant based on

maximum evaluation on both elements of physical possession and mens rea possession. On the issue of physical possession, the trial judge stated:

> On the issue of possession, I am satisfied that the prosecution has successfully proved these physical and mental elements of possession which lead me to hold that the accused was in actual possession. The factual matrix adduced through the prosecution's witnesses in particular SP5 and SP6 reveals that the accused was found holding P13 and P20 in his hands — it was in his physical possession and hence he had custody and control over it.

[8] On the issue of mens rea possession, the trial judge found as follows:

> As regards the mental element — ie knowledge of contents of P13 and P20 can only be proved by inference from surrounding circumstances — relevant factors are from where the drugs were found, how it was recovered, reaction of the accused, the manner it was kept and weight of the drugs (see *Surentheran Selvaraja v Public Prosecutor* [2005] 2 CLJ 264).
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> In this connection the factor of the accused hiding in the dark alley behind a false wall panel which is not locked holding in his hand P13 and P20 the plastic bag and the factor of the weight of the drugs ie 32.6g of monoacetylmorphine are pointers that the drugs are clearly not for his personal consumption. Though his reaction on shivering is by itself not evidence of knowledge nevertheless taking into consideration that the drugs were found in P13 and P20 which was physically held by him in his hands and the amount of drugs recovered to my mind has the cumulative effect of establishing the mental element of knowledge which leads me to conclude that the prosecution has successfully establish that the accused actually knew the nature of the offending exhibits found in P13 and P20.
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> By reason thereof the presumption of trafficking under s 37(da) arises. I am satisfied that at the close of the prosecution's case a prima facie case has been made out and hence the accused is called upon to enter his defence on all three charges.

[9] In analysing the defence on the issue of possession, the trial judge found that the appellant's defence was one of denial. He stated as follows:

> The whole scheme of the accused defence is one of denial — denial of holding P13 and P20 in his hands, denial of having knowledge as to the contents of P13 and P20 which he asserts was found in the alley after he had come out of the alley and into the room, denial that it was SP6 and not D/Kpl Ravidass who found him in the alley and denying that it was three police personnel that entered into the alley and seeing him holding P13 and P20. The denial aforesaid does not to my mind cast a reasonable doubt on the prosecution's case (see *Public Prosecutor v Nur Hassan bin Salip Hashim & Anor* [1993] MLJU 241; [1993] 2 CLJ 551).
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> In my judgment the case of *Chan Chor Shuh v Public Prosecutor* [2003] 1 CLJ 501 (CA) relied on by learned defence counsel is distinguishable on its facts. There the court found many infirmities in the prosecution's case whereas in the case at hand I

have made the finding that SP5 and SP6 are witnesses of truth. The issue of D/Kpl Ravidass presence in the room does not and cannot to my mind create a reasonable doubt.

[10] The trial judge also found that the appellant's defence in regards the issue of the PCO order and the existence of the two canes which was allegedly used by the police to beat the appellant was an afterthought. This is what he said:

Further it is my finding that the accused defence was an afterthought as regards both the issue of the PCO and the existence of two canes that was allegedly used to beat the accused in that the PCO issue was raised after the prosecution closed its case and no cross-examination was made to the raiding party. The issue of the existence of the two canes which was allegedly used to beat the accused was never put to any of the prosecution's witness. As was stated in the case of *Hamidon bin Mat Yatim v Public Prosecutor* [1995] MLJU 112; [1995] 3 CLJ 724:

... question were not put to … in the cross-examination … and subsequently they can be dismissed as mere afterthought.

FINDINGS OF THE COURT OF APPEAL

[11] At the Court of Appeal, every finding of the trial judge was vigorously challenged by the appellant. However, the Court of Appeal could not find any fault with the findings and reasoning of the trial judge (see *Jamaluddin bin Md Kasim v Public Prosecutor* [2010] 3 MLJ 221; [2010] 5 CLJ 928). The Court of Appeal held that from SP5's and SP6's evidence, D/Kpl Ravidass was not the police personnel who spotted the appellant in the alley and asked to come out as suggested by the defence. The Court of Appeal found that D/Kpl Ravidass was not even in the house at the time of the appellant's arrest. Thus, there was no necessity for the prosecution to call D/Kpl Ravidass to give evidence, just because it was put to SP5 and SP6 under cross-examination that D/Kpl Ravidass was the person who spotted the appellant in the alley and requested him to come out. It was held that the non-calling D/Kpl Ravidass by the prosecution had not resulted in procedural unfairness to the appellant to occasion a miscarriage of justice.

[12] The Court of Appeal also held that since the findings of the trial judge were based on credibility or otherwise of the prosecution's witnesses, in particular SP5 and SP6, and of the appellant as well as his witness, the trial judge's view is entitled to great respect. The Court of Appeal found no reason to interfere with those findings. In regard to the appellant's defence, the Court of Appeal held that the trial judge had not erred when he concluded that the appellant's explanation about his fear of the police because he had contravened

A the PCO order, was a product of an afterthought.

FINDINGS OF THIS COURT

B **[13]** It is clear in this appeal that both the High Court and the Court of Appeal had made the concurrent findings of facts that the appellant was in physical possession and mens rea possession of the dangerous drugs. Both courts had also made a concurrent findings that the appellant's defence had failed on the balance of probabilities to rebut the presumption of trafficking under s 37(da) of the DDA, or capable of raising any reasonable doubt as to the C truth of the prosecution's case. Being concurrent findings of facts, at both levels, this court, as the final appellate courts is normally slow in interfering with such findings unless there are serious error committed in coming to such findings (see *Lee Ah Seng & Anor v Public Prosecutor* [2007] 6 MLJ 1; [2007] 5 D CLJ 1 and *Krishna Rao a/l Gurumurthi v Public Prosecutor and another appeal* [2009] 3 MLJ 643; [2009] 2 CLJ 603).

[14] Learned counsel for the appellant however submitted that there is a serious issue of law that arises in this appeal which if resolved in the appellant's E favour, would entitled him to an acquittal. The issue pertains to what was said by the Federal Court in *Ti Chuee Hiang v Public Prosecutor* [1995] 2 MLJ 433. In that case, a team of policeman had planned and organised a trap to arrest a drug dealer, Ti Chuee Hiang. A meeting was arranged through the help of an informer between a policeman posed as a heroine buyer with Ti Chuee Hiang F for the sale of heroine, which ended as a concluded deal. The deal was carried out and Ti Chuee Hiang was arrested when he was delivering the heroine to the police. Ti Chuee Hiang was charged under s 39B(1)(a) of the DDA. Ti Chuee Hiang's defence that he was an innocent carrier of heroine was rejected by the trial judge. He was convicted and sentenced to death.

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[15] The Federal Court in acquitting Ti Chuee Hiang, inter alia, held that:

> While the prosecution has a complete discretion as to the choice of witnesses to be called at the trial, it also has the duty to call all necessary witness essential to the H unfolding of the narrative of the prosecution's case to establish proof against the accused beyond all reasonable doubt. At the very least, the prosecution should make them available for cross-examination by the defence. If the prosecution failed to fulfill this duty, the accused must be acquitted.

I **[16]** Thus, learned counsel for the appellant submitted that in the instant appeal, D/Kpl Ravidass was a material witness and failure by the prosecution to call him as a witness has resulted a serious gap in the prosecution's case. He contended that without the evidence of D/Kpl Ravidass, the trial judge could not have conducted a maximum evaluation of the reliability and credibility of

SP5 and SP6. He submitted that the prosecution at the very least should make D/Kpl Ravidass available for cross-examination by the defence. This was never done, and as such the appellant is entitled to an acquittal.

[17] Learned counsel for the appellant further submitted that the timing of making a witness available for cross-examination must be before the close of the prosecution's case. In support, he referred to two passages in *Blackstone's Criminal Practice 2006* at pp 1568 and 2278 where it is stated:

> As an alternative to calling a witness and examining him in the normal way, it is open for the prosecution counsel to tender a witness for cross-examination. Counsel merely calls the witness, establishes his name and address, and then invites the defence to ask any question they wish.
>
> Usually cross-examination follows immediately after examination in chief, but witnesses are sometimes merely tendered by the prosecution for cross-examination. Such a witness is called by the prosecution, sworn, asked no question in chief other than his name and address, and then cross-examination by the defence (see *Brooke* [1819] 2 Stark 472).

[18] The learned deputy public prosecutor did not dispute the point that when the prosecution's witness is made available for cross-examination by the defence, it must be made before the close of the prosecution's case. However, she submitted that in the instant case there is no necessity to do the same. The reason is, unlike the witness in *Ti Chuee Hiang v Public Prosecutor*, D/Kpl Ravidass was not a material witness that must be called or offered to the defence to be cross-examined before the close of the prosecution's case.

[19] Having read and re-read *Ti Huee Hiang v Public Prosecutor*, we agree with the learned deputy public prosecutor that the principle of law established in that case cannot be of general application as suggested by learned counsel for the appellant. *Ti Chuee Hiang v Public Prosecutor* was a decision peculiar to its own facts. In that case, the witness in issue was the informer, who enticed Ti Chuee Hiang to walk into a trap which the police had pre-set. On the facts, Federal Court found that the informer having regard to his role, was not a mere informer, but had assumed the mantle of an agent provocateur. He was the active instrument without whose intervention Ti Chuee Hiang might never have been arrested. The informer's identity was no longer a secret and thus he had lost the protection from disclosure of identity normally accorded to informers under s 40 of the DDA.

[20] It was on those facts and circumstances that the Federal Court ruled it was the obligation of the prosecution to call and examine the informer as its witness as he came within the category of witnesses described by Lord Roche in *Seneviratne v R* [1936] 3 All ER 36, 'witnesses essential to the unfolding of the

narratives on which the prosecution case is based'. And if he was not called, at the very least make him available for cross-examination by the defence.

[21] We have no hesitation in accepting the above principle. But, we are of the view it is not applicable to the facts of our case. In our case, the witness, D/Kpl Ravidass was not a material witness in regard to the arrest of the appellant and the recovery of P13 and P20, which contained the dangerous drugs. D/Kpl Ravidass cannot be termed as a witness essential to the unfolding of the narrative of the prosecution's case to establish proof against the appellant beyond reasonable doubt. The absence of his testimony did not create a serious gap in the prosecution's case.

[22] The material witnesses in our case were SP5 and SP6. SP5 in his evidence said that when he spotted the appellant in the alley, he directed SP6 and another policeman to enter the alley and bring the appellant out. What was said by SP5 was confirmed by SP6. The trial judge ruled SP5 and SP6 to be credible witnesses and gave his reasons for doing so. The Court of Appeal agreed with trial judge. We have no reasons to disagree. We too are of the view that there is no necessity for the prosecution to call D/Kpl Ravidass to give evidence, just because it was put to SP5 and SP6 under cross-examination that D/Kpl Ravidass was the person who spotted the appellant in the alley and requested him to come out.

[23] We are also of the view that the failure of the prosecution to offer D/Kpl Ravidass to be cross-examined before the close of the prosecution's case was not fatal to the prosecution's case and as such it could not result in the acquittal of the appellant. This is especially so when D/Kpl Ravidass, at the end of the prosecution's case was offered to the defence whereas in *Ti Chuee Hiang v Public Prosecutor*, the informer was never offered as a witness to the defence.

[24] Another point is this. In *Ti Chuee Chiang v Public Prosecutor*, learned counsel for Ti Chuee Hiang in the course of his submission before the High Court criticised the prosecution for failing to call the informer, but nowhere in his judgment did the trial judge direct his attention to this point.

[25] This was ruled by the Federal Court to be a serious misdirection by way of non-direction which had occasioned a grave miscarriage of justice. In our case, the failure by the prosecution to call D/Kpl Ravidass as a prosecution's witness has been addressed by both the trial judge and the Court of Appeal. Both courts ruled that the failure to call D/Kpl Ravidass as a prosecution's witness was not fatal to the prosecution's case. Thus, the issue of misdirection by way of non-direction which can occasion a miscarriage of justice does not arise in this case.

[26] We also wish to state that we have considered the other authorities submitted by learned counsel for the appellant. We found them to be of no assistance to the appellant. At the end of it, we are satisfied that the conviction of the appellant is safe. We therefore dismissed the appeal. The conviction and sentence imposed on the appellant are affirmed.

Appeal dismissed.

Reported by Kohila Nesan